

May 15, 2012

2012 Legislative Amendments to the Indiana Code Relating to First Lien Mortgage Act and the Uniform Consumer Credit Code

Effective July 1, 2012 (except as otherwise indicated)

Questions, Answers, and Administrative Interpretations: This document is a “Q&A” developed by the Indiana Department of Financial Institutions (“DFI” or the “Department”) relating to new provisions and amendments to the First Lien Mortgage Act (IC 24-4.4 *et seq.*) (“FLMA”) and the Uniform Consumer Credit Code (IC 24-4.5 *et seq.*) (“UCCC”). Many of the proposed amendments are aimed at bringing the FLMA and UCCC into compliance with the final rule (“HUD SAFE Rule”) adopted by United States Department of Housing and Urban Development (“HUD”) setting forth the minimum standards for state licensing of residential mortgage loan originators (“MLO”). HUD published the HUD SAFE Rule in the *Federal Register* on June 30, 2011. The HUD SAFE Rule became effective 60 days following publication. The authorities and duties, which were originally delegated to HUD by the SAFE Mortgage Licensing Act of 2008 (“SAFE Act”), were transferred on July 21, 2011, to the newly created Consumer Financial Protection Bureau (“CFPB”) established by the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”).

The following are intended to be “frequently asked questions” to help our licensees, regulatory staff and the general public learn about the recent developments in the area of first lien mortgages and consumer loans and sales, including subordinated lien mortgages, in Indiana. In most cases, the amendments to the FLMA and UCCC parallel each other. However, where noted, there are some amendments applicable only to one act and not to the other. While we have tried to focus on the substantive provisions amending the FLMA and the UCCC, we recommend a careful review of both acts in their entireties.

The new provisions of the FLMA and the UCCC can be found in House Enrolled Act 1239 (“HEA 1239”) at Section 2 (page 2) and Section 13 (page 25), respectively. HEA 1239 can be found at the following link: <http://in.gov/legislative/bills/2012/PDF/HE/HE1239.1.pdf>.

1. How has the adoption by HUD of the HUD SAFE Rule affected the FLMA and UCCC?

- One of the significant interpretations made by HUD is the determination that an individual must be licensed as an MLO if the person is “habitually” or “repeatedly” engaging in the business of a loan originator in a “commercial context”. In order to implement these concepts, many of the states, including Indiana, adopted a “de minimis” exclusion to determine whether a person is required to obtain an MLO license. This change was recently reflected in an amendment to the Indiana SAFE Rule (75 IAC 9 *et seq.*).
 - **FLMA:** Consistent with the amendment to the Indiana SAFE Rule, IC 24-4.4-1-301 was amended to insert the term “regularly engaged” which clarifies that a person (individual or entity) that does five or fewer first lien mortgage transactions in a calendar year is not habitually or repeatedly engaged in the business, and is not a creditor subject to licensing under the FLMA.
 - **UCCC:** IC 24-4.5-1-301.5(39) is the definition of “regularly engaged” and is being amended to provide that a person (individual or entity) that does five or fewer mortgage transactions in a calendar year - is not habitually or repeatedly engaged in the business, and is not a creditor subject to licensing under the UCCC.

- The determination that a person is “regularly engaged” if they originate more than five mortgage transactions was derived from the Federal Reserve’s Regulation Z implementing the Truth in Lending Act. This standard was previously in the statute, but was removed when the SAFE Act was adopted with no such de minimis standard.
- In another interpretation from HUD relating to “habitualness” in a “commercial context”, HUD has determined that an employee of a bona fide nonprofit organization is not “habitually” or “repeatedly” engaging in the business of a loan originator in a “commercial context” and, therefore, does not require licensing. The Indiana SAFE Rule for MLO licensing was amended to be consistent with this HUD interpretation.
 - **FLMA:** To implement this exclusion in the FLMA, IC 24-4.4-1-301 has been amended to add the term “bona fide nonprofit organization” along with the criteria established by HUD and the DFI for an entity to qualify as a bona fide nonprofit organization.
 - Specifically, "bona fide nonprofit organization" means an organization that does the following, as determined by the Director, under criteria established by the Director:
 - (a) Maintains tax exempt status under Section 501(c)(3) of the Internal Revenue Code.
 - (b) Promotes affordable housing or provides home ownership education or similar services.
 - (c) Conducts the organization's activities in a manner that serves public or charitable purposes.
 - (d) Receives funding and revenue and charges fees in a manner that does not encourage the organization or the organization's employees to act other than in the best interests of the organization's clients.
 - (e) Compensates the organization's employees in a manner that does not encourage employees to act other than in the best interests of the organization's clients.
 - (f) Provides to, or identifies for, debtors mortgage transactions with terms that are favorable to the debtor (as described in IC 24-4.4-1-202(b)(15)) and comparable to mortgage transactions and housing assistance provided under government housing assistance programs.
 - (g) Maintains certification by HUD or employs counselors who are certified by the Indiana Housing and Community Development Authority.
 - There are two specific exclusions for nonprofit entities, one of which is found at IC 24-4.4-1-202(14) for employees of a Habitat for Humanity-type organization¹ and the other at subsection (15) for the employees of all other qualifying bona fide nonprofit organizations.
- **UCCC:** IC 24-4.5-1-301.5 was also amended to add in subsection (45) the term “bona fide nonprofit organization.”
 - The specific exclusions for the employees of nonprofit entities are found at IC 24-4.5-1-202(14) for employees of a Habitat for Humanity-type organization² and (15) for the employees of all other qualifying bona fide nonprofit organizations.

¹ Habitat for Humanity obtained a specific exclusion from MLO licensing in the 2011 General Assembly which has been left intact except for changing the term “entity” to “organization,” a change that was only made since organization is a defined term in IC 24-4.4-1-301(26).

² Similarly, Habitat for Humanity obtained a specific exclusion from licensing for subordinate lien mortgage transactions in the 2011 General Assembly which has also been left intact except for changing the term “entity” to “organization.”

2. **What additional exclusions or changes to existing exclusions from the FMLA and UCCC have been adopted by the amendments contained in HEA 1239?**
 - **FLMA:** IC 24-4.4-1-202(12) has been amended to expand the exclusion for governmental agencies to any federal, state or local agency or instrumentality including United States government sponsored enterprises such as Fannie Mae or Freddie Mac.
 - **UCCC:** A similar change was made in the 2011 General Assembly to IC 24-4.5-1-202(13).
3. **Are land contracts considered to be mortgage transactions under the Act?**
 - Answer – Section 1503(8) of the SAFE Act defines the term “residential mortgage loan” to mean “any loan primarily for personal, family, or household use that is secured by a mortgage, deed of trust, or *other equivalent consensual security interest* on a dwelling (as defined in section 103(v) of the Truth in Lending Act) or residential real estate upon which is constructed or intended to be constructed a dwelling (as so defined).” [Emphasis added.]
 - Prior to the issuance of the HUD SAFE Rule, Indiana and a number of other states took the position that a land contract was not a mortgage transaction (the equivalent term for residential mortgage loan under Indiana law) since the seller retained legal title to the real estate until the purchase price was paid. However, HUD, in interpreting the definition of a residential mortgage loan, concluded that the phrase “equivalent consensual security interest” includes land contracts. The Indiana SAFE Rule for MLO licensing has been amended to reflect HUD’s interpretation.
 - **FLMA:** Consequently, HEA 1239 amends IC 24-4.4-1-301(18) and (27), the definitions of first lien mortgage transaction and mortgage transaction, respectively, to include land contracts.
 - **UCCC:** Similarly, IC 24-4.5-1-301.5 has also been amended to include land contracts in the definitions of first lien mortgage transaction, mortgage transaction and subordinate lien mortgage transaction.
4. **Why are the provisions of the FLMA and UCCC relating to payoff statements being amended?**
 - **FLMA:** The amendments to IC 24-4.4-2-201 are intended to clarify the provisions to enable lenders making pre-computed loans to give adequate and accurate payoff statements.
 - **UCCC:** The same changes described in the preceding bullet point have been made to IC 24-4.5-2-209 relating to consumer credit sales and IC 24-4.5-3-209 relating to consumer credit loans.
5. **Does an applicant for a mortgage or consumer credit lending license have any obligation to update his or her information if it becomes incorrect or inaccurate?**
 - **FLMA:** Yes. IC 24-4.4-2-402(1) provides that if, at any time, the information or record contained in an application or renewal application becomes inaccurate or incomplete in a material respect, the applicant shall promptly file a correcting amendment with the Department.
 - **UCCC:** IC 24-4.5-3-503(1) has been amended to make the provisions described in the preceding bullet point applicable to consumer loan licenses.
6. **How can a person obtain an official copy of the records maintained in the Nationwide Mortgage Licensing System and Registry (“NMLSR”) for a business or legal proceeding?**
 - **FLMA:** IC 24-4.4-2-402.4(7) provides that once an electronic document is reduced to paper form it becomes an official record for legal and business purposes.
 - **UCCC:** IC 24-4.5-3-503.4(7) was amended to add the same provision as set out in the preceding bullet point.

7. What changes have been made to the license renewal provisions in the FLMA and UCCC?

- **FLMA:** IC 24-4.4-2-403(1)(d) has been amended to provide that the creditor and its executive officers, directors or managers must certify to the Department that they continue to meet all the standards for licensing under the FMLA.
 - IC 24-4.4-2-403(1) has been further amended to add subsection (e) which requires the creditor to provide in the creditor's renewal application:
 - (i) any information describing material changes in the information contained in the creditor's original application for licensure, or in any previous application, including any previous renewal application; and
 - (ii) any other information the director requires in order to evaluate the renewal of the license issued under the FMLA.
 - IC 24-4.4-2-403(4) provides that if, at any time, the information or record contained in an application or renewal application becomes inaccurate or incomplete in a material respect, the applicant shall promptly file a correcting amendment with the Department.
- **UCCC:** The renewal provisions of IC 24-4.5-3-503.6 have been amended to add the same provisions as set out three preceding bullet points.

8. What are the procedures for the revocation or suspension of FLMA and UCCC licenses?

- Answer – As a part of the Department's legislative package for 2012, all of the consumer credit acts administered by the Department have been amended to make the procedures for license revocations and suspensions uniform and more streamlined.
- **FLMA:** See IC 24-4.4-2-404 for the revisions applicable to the revocation and suspension of first lien mortgage transactions licenses.
- **UCCC:** See IC 24-4.5-3-504 for the revisions applicable to the revocation and suspension of licenses to make consumer loans or consumer credit sales that are mortgage transactions.

9. What changes have occurred to the circumstances under which a director, officer or employee of a creditor can be removed from office or employment?

- **FLMA:** IC 24-4.4-2-404.1 has been amended to provide that, with respect to criminal activity, only a conviction of a felony under Indiana law is grounds to remove a director, officer or employee of creditor from office or employment. Under prior law, conviction or a plea of guilty or *nolo contendere* to a felony was sufficient grounds for removal.
- **UCCC:** The same change as described in the preceding bullet point has been made to IC 24-4.5-6-119.

10. What obligations does a creditor have if it discharges or receives a resignation from an employee, independent contractor, or agent against whom allegations were made of violations of the law or conduct involving fraud, dishonesty, theft, or the wrongful taking of property?

- **FLMA:** The creditor is required to provide the Department written notice of the resignation, discharge, or termination of an employee, independent contractor, or agent against whom allegations were made of violations of the law or conduct involving fraud, dishonesty, theft, or the wrongful taking of property not later than thirty (30) days after the effective date of the resignation, discharge, or termination. IC 24-4.4-2-404.1(5).
- **UCCC:** The same change as described in the preceding bullet point has been made to IC 24-4.5-6-119(e).

11. What happens to the authorities and duties exercised by HUD in administering the SAFE Act?

- The authorities and duties delegated to HUD by the SAFE Act were transferred on July 21, 2011, to the new CFPB established by Dodd-Frank. Accordingly, references to HUD's authorities and duties throughout the HUD Rule should be understood to refer to the authorities and responsibilities of the CFPB.

UCCC Only:

12. What is a "consumer related loan" as set out in IC 24-4.5-3-602?

- Answer - A "consumer related loan" is a loan in which the following apply:
 - (a) The loan is made by a person who is not regularly engaged as a lender in credit transactions of the same kind.
 - (b) The debtor is a person other than an organization.
 - (c) The debt is primarily for a personal, family, or household purpose.
 - (d) Either the debt is payable in installments or a loan finance charge is made.
 - (e) Either:
 - (i) the principal does not exceed fifty thousand dollars (\$50,000); or
 - (ii) the debt is secured by an interest in land or by personal property used or expected to be used as the principal dwelling of the debtor.

13. Is a "consumer related loan" subject to the licensing requirements of IC 24-4.5-3-503 or the volume fees and notification of IC 24-4.5-6-201 through IC 24-4.5-6-203?

- Answer – No. IC 24-4.5-3-602(3) provides that a person engaged in consumer related loans is not required to comply with those provisions.